



Briefings

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TN TOP 3

When Boards Can Close Meetings to Members

Closed meetings are sometimes necessary in order for board members of townhome or condo associations to discuss sensitive matters with their legal counsel without the constraints imposed by the fear of public disclosure. Although the Minnesota Common Interest Ownership Act indicates that regular board meetings must be open to the membership or unit owners, there are three main exceptions where a closed meeting is allowed and appropriate:

1. When discussing personnel matters. The question remains as to whether or not a professionally managed association may close a meeting to discuss issues involving its management. Since most management companies are independent contractors, they may not be subject to this exception.
2. When discussing pending or potential litigation, arbitration or other adversarial proceedings. Issues may arise between unit owners, between the board or association and the unit owners or other matters in which a unit owner may have an adversarial interest. If this is the case, the board also must determine that closing the meeting to the unit members is necessary in order to discuss strategy, protect the position of the board or association

and to protect the privacy of a unit owner or occupant of a unit.

3. When discussing criminal activity that has happened within the common interest community. The closed meeting is to protect the privacy of the victim or if there is a possibility the investigation would be jeopardized if the meeting was open.

If the board is discussing one of the three situations, the minutes from those meetings can – and should – be marked in a way to keep them separate and confidential. However, there is no guarantee that they will not be subject to discovery in an adversarial proceeding or litigation. The minutes pertaining to the actual discussions with the attorney present in the meeting should be excluded due to attorney-client privilege; other statements made by the board members may be admissible.

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Gretchen Schellhas contributed to this article. Gretchen is CEO of the firm and focuses her practice in the areas of Community Association Law and General Civil Litigation, including Family Law.
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Dare I Delete? – When Does Pending Litigation Require You to Keep Emails?

Did you know that if your e-mails are automatically deleted and your computer erases old documents periodically, you could be subject to court sanctions if the deleted material is relevant to a pending or future lawsuit? To understand when you are protected and when you aren't according to Rule 37(e) of the Federal Rules of Civil Procedure and its identical counterpart, Rule 37.05 (the Rules) of the Minnesota Rules of Civil Procedure, we need to take a closer look.

The Rules state, "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Sounds pretty convincing, right? Wrong.

In reality, these Rules do little but provide a false sense of security. A careful parsing of Rule 37.05 reveals several traps that could ensnare the unsuspecting employee or owner. This is what you need to know and how to protect yourself:

- In order for the Rules to apply, information must have been deleted as part of a routine function by your computer. The Rules don't apply, however, if the information was deleted once litigation was pending or reasonably anticipated. As a result, you may still face court sanctions if you didn't stop your computer from deleting information that was relevant to a pending or possible lawsuit.

- The Rules only apply to sanctions, but sanctions aren't the only penalties available to a court. For example, the Rules don't limit the court's broad discovery powers. A court could still order you to answer additional interrogatories or require you to undertake costly efforts to provide substitutes for the lost information.
- The Rules only prevent sanctions based upon the Federal and Minnesota Rules of Civil Procedure. A court may still inflict sanctions based upon other authorities. The Rules state that "a court may not impose sanctions under these rules" Therefore, Rule 37(e) and 37.05 have absolutely no bearing on a court's power to sanction a party based upon statutes, other rules besides the rules of civil procedure, the court's inherent power or the common law.

The Rules are not safe havens and should be viewed as a reminder that your information management system can lead to sanctions if it's not monitored. Specifically, your electronic information system's clean-up function should occur routinely, rather than sporadically, and such functions must be halted when litigation is pending or reasonably anticipated. Anytime you are unsure of how to proceed, checking with your attorney is a good protective measure.

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Nathan Knoernschild contributed to this article. Nathan practices in the areas of General Civil Litigation, Criminal Law, Real Estate Litigation, Real Estate Law and Insurance Litigation. nknoernschild@tn-law.com



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Learn more on page 3.

CASE STUDY: *When Recklessness Wrecks a Life – Finding Justice After Personal Injury*

A smart, ambitious young mother, Jane Smith's* life was derailed one afternoon driving her son to an athletic event. As she passed through a green light into an intersection, a 12-ton bus ran the red light going more than 55 miles an hour and broadsided her car.

It took the Jaws of Life to pull her body from the wreck of her car. She spent two and a half weeks in intensive care and another five in the hospital. Though her son escaped with less serious injuries, Jane suffered from a broken neck, nose, ribs and pelvis, brain damage and many other problems.

An avid runner and high achiever, Jane now had to contend with depression, anxiety and insomnia, blurred vision and memory loss. She faced a long, arduous recovery and the impact on her family was enormous. Her two children had to deal with a mother whose movement and mental faculties were severely limited. Her household felt the increased financial pressure of losing her earnings and her husband and parents had to care for both Jane and the children.

When Jane contacted Thomsen & Nybeck, P.A, her top concerns included making sure her family was taken care of, but also holding the parties responsible for the accident accountable for what happened. The evidence made it clear that the driver of the bus had ample warning of the red light, including an advance warning flasher. He drove through the intersection at a high speed almost five seconds after the light had turned red.

After talking to Jane and understanding the scope of the accident, Bill Sjolholm and other members of the personal injury practice at Thomsen & Nybeck went to work collecting the thousands of details fundamental to a solid case. They investigated the scene of the accident to show that the bus driver was clearly at fault and acting irresponsibly. As Jane learned how to move in a body that was now disabled and to work around her short term memory loss with lists and reminders, Thomsen & Nybeck detailed the loss of her future earnings as upwards of \$700,000. They also looked into the impact on her emotional state and on her family while Jane struggled to rebuild her life.

Bill put together a thorough argument showing the harm that had been done to Jane as a result of the bus driver's carelessness. Thomsen & Nybeck's work convinced the defense that there was no point taking the case to trial and that the numbers were compelling enough to warrant a settlement that ranked in the top five highest settlements in the state of Minnesota for that year.

With the case settled, Jane could put the accident behind her. While she couldn't ever be fully compensated for her loss, she felt justice had been served and that her family is taken care of despite her limitations. After the settlement, she's putting her life back on track, using the tools she's learned to compensate for what she can't do, running recreationally again, and enjoying spending time with her husband and children.

*Names were changed to protect the client's confidentiality.

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Bill Sjolholm and Ryan Wood contributed to this article. Bill practices in the areas of employment law, plaintiffs' personal injury, commercial law, and general civil litigation. Ryan practices in the areas of criminal law and general civil litigation. wsjolholm@tn-law.com | rwood@tn-law.com

“Large enough to be effective.
Small enough to care.”

Site Seeing

Our new website has more of the insightful information that you've come to expect from Thomsen & Nybeck. We've redesigned the whole site to make it easy to find what you're looking for, whether it's contact information or an article on real estate law. You can also now email resources as links directly from our site. Stop in and browse the new Thomsen & Nybeck online at www.tn-law.com.



Here's what else our attorneys have been up to besides working hard to improve our website:

Bill Sjolholm was re-elected to the board of directors for Central Minnesota Legal Services. Bill also has been reappointed to the Governing Council for the Minnesota State Bar Association Civil Litigation Section.



Matt Drewes (1) authored the article "Is Your Association Starting on the Right Financial Foot? A primer on the developer's obligations," which appeared in the Winter 2008 edition of the CIC Midwest News, a publication of CIC Midwest, which is a division of the Minnesota Multi Housing Association.



Deb Newel (2) will graduate in May from the University of St. Thomas Opus College of Business with her Masters in Business Administration (MBA).



Dennis Patrick (3) authored the article "Trust Controls: How business owners can set up a trust to protect beneficiaries." The article appeared in the March 2008 issue of MinnesotaBusiness Magazine.

ATTORNEYS

This newsletter is presented to you by the attorneys of Thomsen & Nybeck, P.A.

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